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Supreme Court of the United States

No. 490

CLEARFIELD TRUST COMPANY, a corporation, and J. C. PENNEY COMPANY, a corporation,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ROSWELL D. PINE, JR.,
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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I

Preliminary Statement

This is an action brought by the United States in the United States District Court for the Western District of Pennsylvania against the petitioners as guarantors of a prior forged endorsement upon a United States Treasury check collected by petitioners from the Treasurer through the Federal Reserve Bank of Philadelphia. The respondent received immediate notice of the forgery but delayed approximately eight months before giving notice to petitioners. Although petitioners were clearly prejudiced by such

delay, they were unable to conclusively prove that they could have apprehended the forger and collected had earlier notice been given. The respondent contends that under *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302 (1909) an unreasonable delay is no defense under these circumstances. Petitioners contend that the law of Pennsylvania is applicable since the check was delivered and paid in that state. Under the law of that State such unreasonable delay is a defense, *Market Street Title and Trust Company* v. *Chelton Trust Co.*, 296 Pa. 230, 145 Atl. 848. The principal question involved is whether the case is governed by Pennsylvania law or by a general federal rule as the Circuit Court of Appeals for the Third Circuit held. There is a second question as to whether the unreasonable delay and prejudice shown in this case are a defense even if a federal rule does apply. The decision of the Circuit Court of Appeals is reported in 130 Fed. 2d 93.

II

Jurisdiction

The jurisdiction of the United States District Court for the Western District of Pennsylvania was based upon the fact that the action was instituted by the United States as plaintiff, Title 28 U. S. C. section 41 (1). The District Court dismissed the complaint, (R. 21). The Circuit Court of Appeals for the Third Circuit reversed, (130 Fed. (2d) 93). Its order of reversal was entered July 29, 1942. The jurisdiction of this Court is invoked by reason of its jurisdiction to review decisions of the Circuit Courts of Appeals under Title 28, U. S. C. section 347 (Judicial Code, section 340, as amended).

III

Summary Statement of the Matter Involved

The facts are stipulated (R. 13-17). On April 28, 1936 L. B. Witcombe, a disbursing clerk employed by the Treasury Department, drew a W. P. A. check upon the Treasurer of the United States payable through the Federal Reserve Bank of Philadelphia to the order of Claire A. Barner in the sum of $24.20. This check was mailed to the payee but was never received by him and in some unknown manner came into the possession of the forger. The forger represented that he was Claire A. Barner and negotiated the check to the J. C. Penney Company store in Clearfield, Pennsylvania, for value. J. C. Penney Company endorsed the check and deposited it in its account with the Clearfield Trust Company which accepted the check as agent for collection. The Clearfield Trust Company endorsed the check and collected it from the respondent through the Federal Reserve Bank of Philadelphia and paid the proceeds to J. C. Penney Company.

On or before May 10, 1936 the payee advised the timekeeper of the W. P. A. project on which he was employed, and the foreman upon the same project, both of whom were the respondent's agents, that he had not received the check. This information was duly communicated to other agents of the respondent. The respondent did not notify the Clearfield Trust Company or J. C. Penney Company of the alleged forgery of said endorsements until January 12, 1937. On August 31, 1937 they were first notified that the respondent was requesting reimbursement.

Although diligent efforts were made, the identity of the forger was never ascertained and J. C. Penney Company was unable to recover the money or merchandise paid over to him. No effort was made by the respondent to explain its long delay, after receiving notice of the forgery in passing such notice along to petitioners and respondent made no contention in the Court below that such delay was reasonable or excusable.

IV

Questions Presented and Reasons for Allowance of the Writ

In the case of *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302 (1909), this Court held that an endorser was not relieved of liability because of an unreasonable delay of the United States in giving notice of a forgery because it owed no duty to give such notice. In *Market Street Title & Trust Company* v. *Chelton Trust Company*, 296 Pa. 230, 145 Atl. 848, the Supreme Court of Pennsylvania held that an unreasonable delay in giving notice was in and of itself a defense and that prejudice would be presumed to an endorser who would necessarily be hindered and delayed in his efforts to apprehend the forger and obtain reimbursement.

The *National Exchange Bank of Providence* case was decided before *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. The District Court in the instant case concluded that the *Erie R. R.* case and *United States* v. *Guaranty Trust Company*, 293 U. S. 340, required the application of the law of Pennsylvania. That Court then held the plaintiff's delay in giving notice to be unreasonable and dismissed the complaint (R. 21).

The Circuit Court of Appeals reversed. It held that the rule of *Erie R. R. Co.* v. *Tompkins* did not apply because jurisdiction in the instant case is based upon the fact that the United States is the plaintiff and not upon diversity of citizenship. See *D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447. It stated that the check involved was issued in payment for services performed under the Emergency Relief Act, 15 U. S. C. ch. 16, sec. 721-728, and that the case and facts here in litigation originated as directly from the constitution and statutes of the United States as did the facts in *Board of Commissioners* v. *United States*, 308 U. S. 343, *Deitrick* v. *Greaney*, 309 U. S. 190, and *Royal In-*

demnity Company v. *United States*, 313 U. S. 289. It held that the federal rule was established by *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, and should be applied.

The first question, therefore, is whether negotiable instruments issued by the United States in a particular state and payable through a federal reserve bank in that state are subject to the Negotiable Instruments Law, other statutes and common law rules of the state or to general federal rules. Petitioner submits that the Circuit Court of Appeals for the Third Circuit has decided this case in a manner not in accord with *United States* v. *Guaranty Trust Company*, 293 U. S. 340 and *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. In *United States* v. *Guaranty Trust Company* this Court held that the United States in issuing negotiable instruments acts in a non-sovereign capacity and has the same rights and obligations with respect thereto as a private individual and further that such rights and obligations are subject to local rules of law.

Secondly, the decision of the Court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Security First National Bank of Los Angeles* v. *United States*, 103 Fed. (2d) 188, in which that Court said, at page 189:

> "The rights and liabilities of the parties are to be determined according to the law of the State of California, where the check was delivered and negotiated. United States *v.* Guaranty Trust Co. of New York, 293 U. S. 340, 346, 55 S. Ct. 221, 79 L. Ed. 415, 95 A. L. R. 651. The Government neither has nor asserts a preferred status. 'As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals.' United States *v.* Guaranty Trust Co. of New York, supra, 293 U. S., at page 350, 55 S. Ct. 221, at page 226, 79 L. Ed. 415, 95 A. L. R. 651."

See also *United States v. Citizens Union National Bank*, 40 Fed. Supp. 609 (D. C. W. D. of Ky.), and *United States* v.

National City Bank of New York, 28 Fed. Supp. 144 (D. C. S. D. N. Y.).

The amount involved in this case is obviously very small. However, an important question of administration is concerned by reason of the millions of checks issued by the federal government. There is no federal Negotiable Instruments Law and the question constantly arises as to what law is applicable. While all of the states have adopted the Uniform Negotiable Instruments Law, the supreme courts of the various states have handed down various conflicting interpretations of it and also have not been consistent in their decisions on common law problems not expressly covered by the law. Under such circumstances, many cases arise which should be decided one way under the decisions of the courts of some particular state but another under a former federal rule or the "majority rule". The Treasury naturally picks the rule favorable to it and contends that it is the "federal rule". A final decision by this Court on the problem will be of assistance both to the Treasury and private counsel in dealing with questions of this type.

In the event that this Court shall decide that the federal rule is applicable, a second question arises as to the scope and application of the decision of this Court in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302. The stipulation in the instant case sets forth at some length the prejudice to Clearfield Trust Company and J. C. Penney Company by reason of the failure of the respondent to notify them promptly after learning of the forgery (R. 16-17). It is evident that the effect of the long delay of respondent in notifying endorsers was to deprive them of a reasonably good chance that they could have apprehended the forger and secured reimbursement. In *Market Street Title and Trust Company* v. *Chelton Trust Company*, the Supreme Court of Pennsylvania explained the basis for its ruling on this point as follows:

> "This right is to proceed immediately, and to the promptness with which a bank is able to exercise it,

recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake, for, by withholding from it what he has discovered, he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right." (296 Pa. 230, 239)

The Circuit Court of Appeals concluded that the *Rule of United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, has been modified to such an extent that delay gives an endorser a defense in the event that he can positively show that he was prejudiced thereby, *Ladd & Tilton Bank* v. *United States*, 30 Fed. (2d) 334 (C. C. A. 9th); *United States* v. *National Rockland Bank*, 35 Fed. Supp. 912 (D. C. Mass.); *United States* v. *National City Bank of New York*, 28 Fed. Supp. 144 (S. D. N. Y.), but concluded that the prejudice shown in the instant case was insufficient.

Petitioner submits that real prejudice does exist under the circumstances of this case. In ninety-nine cases out of a hundred, it is impossible to make any more positive showing of prejudice than is shown by the record herein. Petitioner submits that the Pennsylvania rule on this subject, as laid down in *Market Street Title & Trust Co.* v. *Chelton*

Trust Company is much more realistic than that followed by the Court below. In any event we do believe that this Court should determine whether or not *United States* v. *National Exchange Bank of Providence* still expresses the federal rule, whether it is modified as concluded by the Circuit Court of Appeals or whether even if the Federal Court is not bound to follow local law, it should not have followed the Pennsylvania law in this case as a matter of discretion (*Royal Indemnity Co.* v. *U. S.*, 313 U. S. 289) since the respondent saw fit to deliver its negotiable instruments in Pennsylvania and to employ the commercial banking structure of that State for collecting them through the Federal Reserve Bank of Philadelphia.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

ROSWELL D. PINE, JR.,
Counsel for Petitioners.

Dated: New York, N. Y.
October 25, 1943.